CRITICAL SYSTEM SPECIALIST SDN BHD v. CLLS POWER SYSTEM SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
AZIZUL AZMI ADNAN J
[CIVIL SUIT NO: 22NCC-390-09-2017]
15 MARCH 2019

CONTRACT: *Damages – Liquidated damages – Contractor appointed to carry out works for project – Clause in main contract provided that contractor liable to pay liquidated damages if works not completed by required completion date – Contractor entered into contract with subcontractor for purchase of generators – Generators failed testings and caused delay in completion of project – Contractor imposed with liquidated damages under main contract – Whether contractor could claim for liquidated damages paid for from subcontractor – Whether subcontractor aware of clause on liquidated damages in main contract – Contracts Act 1950, s. 74*

By way of a letter of award ('LOA'), Telekom Malaysia Bhd ('TM') appointed the plaintiff as the contractor to undertake renovation works in connection with a proposed expansion of TM's data centre ('the project'). Under the LOA, the plaintiff was required to pay liquidated damages if it failed to complete the works by the completion date. The plaintiff then entered into a contract with the defendant to purchase three generators that would be used for the project ('the contract'). The first and second emergency power generator ('EPG') sets underwent an integrated systems testing and failed. When the first EPG ('EPG1') finally passed the integrated systems testing, there was already a delay in the project. Due to the delay, TM imposed charges amounting to RM3,283,200 on the plaintiff pursuant to the liquidated damages clause in the LOA. Initially, TM had also wanted a 50% rebate from the original price for EPG1 but the plaintiff persuaded TM to accept a rebate of 30%. In the present action, the plaintiff sought to make the defendant liable for the liquidated damages that the plaintiff had paid TM and for the 30% rebate on EPG1. In addition, the plaintiff claimed certain other costs it claimed it had incurred in, *inter alia*, engaging an engine specialist to verify the repair works. The defendant counterclaimed against the plaintiff for the sum of RM188,968.31 and this sum comprised (i) RM167,768.31, which was invoiced on 5 April 2016, relating to items in the purchase order of 6 July 2015; and (ii) RM21,200 which was claimed for the supply of temporary load banks which the defendant contended was payable pursuant to item 7 of the purchase order of 6 July 2015.

Held (allowing claim and counterclaim in part):

(1) Illustration (i) to s. 74 of the Contracts Act 1950 ('the Act') demonstrates that, where the special circumstances of the plaintiff is not communicated to the defendant, the defendant could not be made liable for the damage or loss that the plaintiff incurs as a result of such circumstances. The scenario described by illustration (i) applies equally

where what is claimed are damages suffered rather than a loss of expected profits. Applied to the facts of this case, if the plaintiff had not informed the defendant of the severe consequences of delay under the LOA, the defendant ought not to be liable to indemnify the plaintiff for the full amount of its loss. However, some losses ought clearly be claimable against the defendant on the basis that it would be reasonable contemplation that a delay would result upon monetary damages being visited upon the plaintiff by TM. (paras 37-39)

(2) The plaintiff was not entitled to claim the full amount of the actual liquidated damages that it paid to TM as it had not told the defendant, at any time prior to the entering into the contract, that it was liable to TM for liquidated damages for late delivery. Nonetheless, because the defendant knew of the existence of a contract between the plaintiff and TM and because it was within the contemplation of a reasonable person in the position of the defendant that liquidated damages would have been likely to have been provided for in a contract of the nature entered into between the plaintiff and TM, the plaintiff was entitled to a fair and reasonable compensation in the amount of RM500,000, having regard to the value of the contract as well as the amount of liquidated damages actually paid by the plaintiff to TM. (para 21)

(3) The contract did not provide for any obligation on the part of the defendant to replace any of the generator sets in the event that any of them failed the testing and commissioning procedures. EPG1 had been repaired by the defendant. There was no suggestion that what had initially been delivered by the defendant to TM's premises was anything other than a new generator set. Just because EPG1 failed during the integrated systems testing and consequently had to undergo an overhaul and its parts replaced did not make it a second-hand generator. Therefore, the payment of the rebate by the plaintiff to TM was misconceived. (paras 58 & 59)

(4) Based on the witness statement of the plaintiff's director ('PW1'), there was no evidence of the additional costs. Nowhere did PW1 refer to any documentary evidence such as invoices, receipts or other proof of payment for these additional costs incurred by the plaintiff. In the circumstances, the plaintiff's claim for these items of costs was dismissed. (paras 61 & 63)

(5) PW1 accepted that the items invoiced on 5 April 2016 would have been payable and for this reason, the counterclaim for the amount of RM167,768.31 was allowed and the amount was directed to be set off against the amount of damages due from the defendant to the plaintiff. By contrast, the claim of RM21,200 was not supported by any invoice issued by the defendant. This part of the counterclaim was dismissed. (paras 68 & 69)

Case(s) referred to:
Cubic Electronics Sdn Bhd (In Liquidation) v. MARS Telecommunications Sdn Bhd [2019] 2 CLJ 723 FC ***(refd)***
Czarnikow v. Koufos [1969] 1 AC 350 ***(refd)***
Die Elbinger Actien-Gesselschafft Für Fabrication Von Eisenbahn Materiel v. Armstrong (1874) LR 9 QB 473 ***(refd)***
Hadley v. Baxendale (1854) 9 Exch 341 ***(refd)***
Hong Hok Realty v. Bima Investment [1993] 1 SLR 73 ***(refd)***
Malaysian Rubber Development Corporation Bhd v. Glove Seal Sdn Bhd [1994] 4 CLJ 783 SC ***(refd)***
Monarch SS Co v. Karlshamns Oljefabriker [1949] AC 196 ***(refd)***
Selva Kumar Murugiah v. Thiagarajah Retnasamy [1995] 2 CLJ 374 FC ***(refd)***
Tham Cheow Toh v. Associated Metal Smelters Ltd [1972] 1 LNS 153 FC ***(refd)***
Transfield Shipping Inc v. Mercator Shipping Inc [2009] 1 AC 61 ***(refd)***
Victoria Laundry v. Newman Industries [1949] 2 KB 528 ***(refd)***

Legislation referred to:
Contracts Act 1950, ss. 74(1), 75

Other source(s) referred to:
Chitty on Contracts, 30th edn, 1634, footnote 306

For the plaintiff - Wilson Lim & Yeap Poay Nee; M/s Teoh Pek Wei
For the defendant - Conrad Young, PL Leong & Tan Shang Neng; M/s Sreenevasan Young

Reported by Najib Tamby

JUDGMENT

Azizul Azmi Adnan J:

Introduction

[1] The defendant in this case, CLLS Power System Sdn Bhd, agreed to supply three diesel-powered generator units to the plaintiff, Critical System Specialist Sdn Bhd. Due to delays in the commissioning of the generators, the plaintiff became liable to Telekom Malaysia Berhad ("TM") for damages under a contract that the plaintiff had with TM.

[2] In this action, the plaintiff sought to claim from the defendant the damages that it had paid to TM.

Material Background Facts

[3] TM appointed the plaintiff by a letter of 2 June 2015 (the "letter of award") to undertake renovation works in connection with a proposed expansion of TM's data centre located in Brickfields. The total contract value was RM28.9 million. An attachment to the letter of award provided for the terms of the contract between TM and the plaintiff, among which was a liquidated damages clause, which read as follows:

> If the Contractor falls to complete the Works by the required completion date, the Contractor shall pay to TM a sum calculated below as Liquidated Damages for the period during which the said Works shall so remain or have remained incomplete.

A (a) On Sectional Completion
Ringgit Malaysia Twenty Eight Thousand Eight Hundred (RM28,800.00) Only per day.

(b) On Total Completion
Ringgit Malaysia Thirty Six Thousand (RM36,000.00) Only per day

B The aforesaid sum shall be paid by direct remittance within thirty (30) days of written notification by TM of the liability of the Contractor to pay Liquidated Damages and the quantum imposed.

[4] The documentary evidence showed that, even before the plaintiff had been appointed under the letter of award, the plaintiff had approached the C defendant to obtain a quotation from the latter for the supply of a diesel-powered generator set. (Generator sets were required for the purposes of providing back-up power supply for the data centre.) Among the documents that were provided by the defendant was a manufacturer's warranty and a letter of undertaking both dated 11 March 2015, which were addressed D directly to TM. These documents referenced the contract that was to be entered into between TM and the plaintiff. There was therefore evidence to show that, even before the plaintiff and the defendant entered into contractual relations, the defendant knew that the generator set for which it had provided a quote would be delivered to TM under a contract to be entered into E between TM and the plaintiff.

[5] What can be surmised from the preceding paragraph was that TM had conducted a tender for the data centre renovation project, and that it had required interested contractors to provide quotations and various undertakings from the suppliers of the equipment that were to be used for the F purposes of the data centre.

[6] After it was appointed as the contractor for the data centre renovation project, the plaintiff then entered into a contract with the defendant to purchase the three diesel generators that would be used for the project. The terms of the contract between the parties is recorded in a purchase order from G the plaintiff dated 6 July 2015, which was countersigned by the defendant. The offer and acceptance comprised in this purchase order is referred to in this judgment as the "contract".

[7] The total value of the contract was RM2,968,000. The contracted price was to include site testing and commissioning as well as integrated H systems testing.

[8] In the plaintiff's original case as pleaded, it sought to claim that the defendant had been late in effecting delivery of the generator sets. This claim was however abandoned after trial. Learned counsel for the plaintiff accepted I the defendant's position that delivery was to be effected ten weeks after the payment of a deposit by the plaintiff.

[9] The three generator sets were delivered on 23 October 2015. On 30 October 2015, the first generator set (designated EPG1, with EPG being the abbreviation for "emergency power generator") underwent integrated systems testing.

[10] It failed.

[11] Evidence was received at trial that the reason that EPG1 failed was partly because its exhaust pipe had not been properly cladded with insulation. A generator set such as EPG1 comprises a large diesel-powered engine (in this case a 16-cyclinder turbocharged Mitsubishi engine developing 2399 brake horsepower). The engine is commonly encased in a metal container, referred to in the industry as a canopy. The exhausts from the combustion process must be vented outside the canopy, and for this purpose, an exhaust pipe will run from the combustion chamber of the engine, through the interior of the canopy, leading to the outside wall of the canopy. The exhaust pipe must be cladded with insulation to prevent the ambient temperature in the canopy from exceeding operational limits.

[12] If the ambient temperature in the canopy becomes too high, the engine may overheat. In order to prevent this, a thermostat-activated switch is employed to switch the engine off when temperatures exceed a prescribed limit. In the case of EPG1, the thermo-switch failed, resulting in engine failure. In order to repair EPG1, it was necessary to overhaul the engine, which involved disassembly, inspection and repair, and which in turn may entail replacing pistons, bearings, gaskets and other seals.

[13] EPG2 also encountered problems. It was not until 10 June 2016 that EPG1 successfully passed the integrated systems testing.

[14] As a result of these delays, TM imposed charges amounting to RM3,283,200 on the plaintiff pursuant to the liquidated damages clause in the letter of award. Initially, TM had also wanted a 50% rebate from the original price for EPG1, as TM was of the view that, due to the repairs that had been made to EPG1, it was a refurbished rather than new engine. The plaintiff eventually persuaded TM to accept a rebate of 30%.

Issues

[15] The plaintiff sought to make the defendant liable for the liquidated damages that the plaintiff had paid TM and for the 30% rebate on EPG1. In addition, the plaintiff claimed certain other costs it claimed it had incurred in, among others, engaging an engine specialist to verify the repair works.

[16] The defendant counterclaimed in respect of certain items under the contract in respect of which it contended that payments had not yet been made.

[17] In my view, the cause of the delay was clearly attributable to the defendant, because it was its responsibility to ensure that the generator sets passed integrated systems testing. In addition, it was established in evidence that the initial failure of EPG1 was clearly caused by the failure to properly clad the exhaust pipe combined with the failure of the thermo-switch, both of which were the responsibility of the defendant.

[18] The pivotal issue in this case is whether the plaintiff is able to claim from the defendant the amount of the liquidated damages that it had paid to TM and the 30% rebate that it had given to TM.

[19] The remaining issues are:

(i) whether the plaintiff was entitled to claim the other costs claimed by the plaintiff in items 3 to 21 of Appendix 3 to the statement of claim. These appear to include costs that the plaintiff contended had been incurred as a consequence of the repairs made the generator sets; and

(ii) whether the plaintiff was liable to the defendant in the amount of RM188,968.31 that was counterclaimed by the defendant. This amount relates to specific items in the contract for which payment had not yet been made by the plaintiff.

[20] These issues are considered in the following paragraphs.

Analysis And Decision

The Claim For Reimbursement Of The Liquidated Damages Paid To TM

[21] In my view, the plaintiff is not entitled to claim the full amount of the actual liquidated damages that it had paid to TM, as it had not told the defendant at any time prior to the entering into of the contract, that it was liable to TM for liquidated damages for late delivery. Nonetheless, I take the view that, because the defendant knew of the existence of a contract between the plaintiff and TM and because it was within the contemplation of a reasonable person in the position of the defendant that liquidated damages would have been likely to have been provided for in a contract of the nature entered into between the plaintiff and TM, the plaintiff is entitled to fair and reasonable compensation in the amount RM500,000, having regard to the value of the contract, as well as the amount of liquidated damages actually paid by the plaintiff to TM.

[22] Before launching into an analysis of the applicable principles, it would be salutary to be reminded of the following passage in the judgment of the Singapore Court of Appeal in *Hong Hok Realty v. Bima Investment*[1]:

> Decided cases are instructive for the illustrations they provide of how the general principles have been applied to the facts of particular cases. It must be borne in mind, however, that the ascertainment of damages is an exercise to establish a question of fact, that is what loss and damage have been suffered by the plaintiff in the particular case before the court, and

to award him damages ascertained according to these principles. Decided cases are useful more for the principles they enunciate, than for the result of the application of the principles.

[23] The starting point in any analysis of damages should be s. 74 of the Contracts Act 1950, which provides as follows:

74 Compensation for loss or damage caused by breach of contract

(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

(2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

[24] The Malaysian courts have consistently held that s. 74 is a codification of the principles in *Hadley v. Baxendale*[2]; see for example, the decision of the Federal Court in *Tham Cheow Toh v. Associated Metal Smelters Ltd*[3], where Ali FJ held:

The measure of damage recoverable involves the consideration of section 74 of the Contracts (Malay States) Ordinance which substantially affirms the rule of common law laid down in *Hadley v. Baxendale* (1854) 9 Exch 341 which was in two parts, namely (1) damage arising naturally, i.e. according to the usual course of things from the breach, and (2) when they are such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

[25] Thus damages are recoverable against a defendant if either of the two limbs in s. 74(1) is satisfied: the plaintiff must establish that the damages incurred arose as a natural consequence of the defendant's breach of his contractual obligations, or that the parties knew at the time of the contract that the damages suffered would be the likely result of the breach.

[26] The formula of the second limb in *Hadley v. Baxendale* differs from the words used in our statute: s. 74(1) appears to contemplate that the parties must have known that the damage would be likely result of the breach, whereas Alderson B in *Hadley v. Baxendale* referred to such damage "as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract". The statutory provision appears to require actual knowledge on the part of the parties, whereas the common law test is one of constructive knowledge.

[27] Here again, the Malaysian courts have consistently read the words "knew, when they made the contract, to be likely to result from the breach of it" to encompass not only what the parties actually knew, but also what they ought to have known: see for example, *Malaysian Rubber Development Corporation Berhad v. Glove Seal Sdn Bhd*[4], where Mohamad Dzaidin SCJ held:

A For the sake of completeness, it should be mentioned that our courts have treated the position under the second limb of the section to be similar to the second limb of *Hadley v. Baxendale*, which is, the party may recover damages which may 'reasonably be supposed to have been in contemplation of both the parties, at the time they made the contract'. See *Associated Metal Smelters Ltd v. Tham Cheow Toh* [1971] 1 MLJ 271.

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[28] Helpful guidance as to meaning of the tests in *Hadley v. Baxendale* was provided by Asquith LJ in *Victoria Laundry v. Newman Industries*[5], where the principles were distilled into the following:

(1) It is well settled that the governing purpose of damages is to put the party whose rights have been violated in the same position, so far as money can do so, as if his rights had been observed: (*Sally Wertheim v. Chicoutimi Pulp Company* [1911] AC 301). This purpose, if relentlessly pursued, would provide him with a complete indemnity for all loss *de facto* resulting from a particular breach, however improbable, however unpredictable. This, in contract at least, is recognised as too harsh a rule. Hence,

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(2) In cases of breach of contract the aggrieved party is only entitled to recover such part of the loss actually resulting as was at the time of the contract reasonably foreseeable as liable to result from the breach.

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(3) What was at that time reasonably so foreseeable depends on the knowledge then possessed by the parties or, at all events, by the party who later commits the breach.

(4) For this purpose, knowledge "possessed" is of two kinds; one imputed, the other actual. Everyone, as a reasonable person, is taken to know the "ordinary course of things" and consequently what loss is liable to result from a breach of contract in that ordinary course. This is the subject matter of the "first rule" in *Hadley v. Baxendale*. But to this knowledge, which a contract-breaker is assumed to possess whether he actually possesses it or not, there may have to be added in a particular case knowledge which he actually possesses, of special circumstances outside the "ordinary course of things," of such a kind that a breach in those special circumstances would be liable to cause more loss. Such a case attracts the operation of the "second rule" so as to make additional loss also recoverable.

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(5) In order to make the contract-breaker liable under either rule it is not necessary that he should actually have asked himself what loss is liable to result from a breach. As has often been pointed out, parties at the time of contracting contemplate not the breach of the contract, but its performance. It suffices that, if he had considered the question, he would as a reasonable man have concluded that the loss in question was liable to result (see certain observations of Lord du Parcq in the recent case of *A/B Karlshamns Oljefabriker v. Monarch Steamship Company Limited* [1949] AC 196.)

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(6) Nor, finally, to make a particular loss recoverable, need it be proved that upon a given state of knowledge the defendant could, as a reasonable man, foresee that a breach must necessarily result in that loss. It is enough if he could foresee it was likely so to result. It is indeed enough, to borrow from the language of Lord du Parcq in the same case, at page 158, if the loss (or some factor without which it would not have occurred) is a "serious possibility" or a 'real danger." For short, we have used the word "liable" to result. Possibly the colloquialism "on the cards" indicates the shade of meaning with some approach to accuracy.

[29] This *dicta* of Asquith LJ was subsequently the subject of thorough examination in the House of Lords case of *The Heron II*[6], and revisited in its more recent subsequent decision in *The Archilleas*[7]. It will not be necessary for the purposes of the present case to delve in detail to these subsequent decisions. It will suffice for me to make the following observations: first, the courts in subsequent cases have continued to apply the classical formulation of Asquith LJ in *Victoria Laundry* when considering the question of whether a damage claimed was too remote. Second, the reformulated test advanced by Lord Hope and Lord Hoffman in *The Archilleas* (in which the question to be decided was whether the contracting party had assumed responsibility for the loss) would appear to be contrary to the express words of s. 74(1) of the Malaysian Contracts Act 1950.

[30] The facts of the present case before me show that the defendant knew that the generator sets to be supplied to the plaintiff would be thereafter installed at facilities owned by TM. At trial, when the witness for the plaintiff sought to explain in cross-examination that the defendant had assisted the plaintiff with the tender exercise with TM, learned counsel for the defendant cut him short. When counsel for the plaintiff then sought to elicit the answer in re-examination, Mr Young for the defendant objected, stating that the fact sought to be established had not formed the plaintiff's pleaded case.

[31] In my view, because the testimony from the plaintiff's witness arose in answer to a question asked in cross-examination, the answer ought to be allowed, even assuming that it represented a departure from the plaintiff's pleaded case. Having raised a point in cross-examination, it would be manifestly unfair to permit the cross-examiner firstly to cut short an answer when it appears to counsel that the answer would be unfavourable to his client's case, and then subsequently to object when the point was sought to be clarified in re-examination.

[32] Be that as it may, this point of advocacy and procedure is not material to the outcome of this case, as the undisputed documentary evidence shows that the defendant had provided a manufacturer's warranty directly to TM on 11 March 2015[8], which was before the date of the contract. It can therefore be concluded that the defendant knew that the generator sets were

going to be supplied to the plaintiff for installation at TM's premises, and that a contract was going to be entered between TM and the plaintiff for this purpose.

[33] There was, however, no evidence that the liquidated damages clause set out in the attachment to the letter of award had been communicated or otherwise made known to the defendant prior to entering into the contract. It was only on 25 September 2015 - well after the contract was entered into - that a representative of the plaintiff mentioned "LAD"[9], which was understood to mean liquidated and ascertained damages.

[34] Even though the defendant may not have had any actual knowledge at the time the contract was entered into regarding the precise scope of the liability of the plaintiff to TM for liquidated damages for delays, I am of the view that a reasonable man in the position of the defendant would have contemplated that there would have been some monetary consequences for the plaintiff if it delayed in completing the project for TM. The defendant appears to have been involved in the business for quite some time, judging from the fact that DW1, its general manager, had been in employment with the defendant for approximately ten years, whereas DW3, a former project manager, had been employed by the defendant for approximately 18 years. The defendant could therefore be expected to know that, customarily in construction-related projects, there would not only be an obligation to deliver on time, but also that there would be terms providing for the payment of liquidated damages upon any delay. The court can quite properly take into account the commercial capacity in which a party has contracted, for as was held in *Monarch SS Co v. Karlshamns Oljefabriker*[10]:

> [R]easonable businessmen each must be taken to understand the ordinary practices and exigencies of the other's trade or business.

[35] In my judgment, because the full scope of the plaintiff's liability for liquidated damages under the letter of award had not been communicated to the defendant, the plaintiff is not entitled to claim against the defendant the full amount of the liquidated damages that it had in fact paid to TM. At the same time, because it would have been within the contemplation of a reasonable person in the position of the defendant that there would be some liquidated damages payable by the plaintiff to TM consequent upon a delay, the defendant would be liable to pay fair compensation for delay that it has caused, taking into account the nature of the contract.

[36] In the following paragraphs, I set out the authorities that, in my view, provide support for this finding.

[37] Illustration (i) to s. 74 demonstrates that, where the special circumstances of the plaintiff is not communicated to the defendant, the defendant could not be made liable for the damage or loss that the plaintiff incurs as a result of such circumstances:

> (i) A delivers to B, a carrier, a machine, to be conveyed, without delay, to A's mill, informing B that his mill is stopped for want of the machine. B unreasonably delays the delivery of the machine, and A, in consequence, loses a profitable contract with the Government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.

[38] In my view, the scenario described by illustration (i) applies equally where what is claimed are damages suffered rather than a loss of expected profits. In this illustration, because A has not informed B of its profitable Government contract, A would not be permitted to claim the loss of expected profits arising from that contract. Instead, A would only be permitted to claim the average profit that he would have ordinarily attained by the working of the mill.

[39] Applied to the facts of our present case, if the plaintiff has not informed the defendant of the severe consequences of delay under the letter of award, the defendant ought not be liable to indemnify the plaintiff for the full amount of its loss thereunder. However, some losses ought clearly be claimable against the defendant, on the basis that it would within be reasonable contemplation that a delay will result upon monetary damages being visited upon the plaintiff by TM.

[40] If a promisee wishes a promisor to be responsible for a specific type of risk (in other words, a risk that could not be said to arise naturally from a breach of the contract), he must inform the promisor of that risk. This is so that the risk may be priced into the contract, or so that the promisor may decide to exclude liability. See *Chitty on Contracts*[11] at 1634, footnote 306.

[41] Returning to the case of *Tham Cheow Toh v. Associated Metal Smelters*, the plaintiff in this case wished to acquire a specially constructed tilting lead melting furnace from the defendant. The defendant delivered a quote to the plaintiff, stating that the furnace was capable of withstanding temperatures of 2600°F, and promising delivery within 45 days. The order was confirmed in writing by the plaintiff. It transpired that the furnace was not capable of reaching 2600°F. The question before the Federal Court was whether the plaintiff was entitled to claim its loss of expected profits.

[42] The court allowed the claim for loss of profits, affirming the decision of the trial judge, who had awarded some but not all of the profits claimed. Ali FJ held:

> In our view this case falls within the second rule which is that the appellant would not be liable for payment of damages for loss of profits unless there is evidence before the court that the special object of the furnace had been drawn to their attention and that they contracted on the basis that delay in delivery of the particular furnace would make them liable to payment of loss of profits. In this case it would appear from the

A evidence that the appellant knew they were required to deliver a furnace which could produce a temperature of 2600°F. By their promise to deliver the furnace within 45 days after confirmation of the order, they must be assumed to have appreciated the urgency of the matter. In this way it is reasonable to think that any delay in the delivery of the required furnace would affect the business profits of the respondent. Here the learned trial B judge would appear to have in mind, indeed he said so in his judgment, that the respondent must have suffered some loss of profits.

[43] This case again illustrates the principle that where the special object, use or risk has been communicated to the defendant, the defendant may be liable for losses arising if the court were to form the view that a reasonable C person in the position of the defendant could have deduced from the facts that had been communicated to him that such losses were likely to occur. In this case, the Federal Court did not interfere with the assessment of damages by the trial judge, even though it acknowledged that the amounted awarded was "merely conjectural".

D **[44]** In *Die Elbinger Actien-Gesselschafft Für Fabrication Von Eisenbahn Materiel v. Armstrong*[12], the defendant agreed to deliver wheels and axles to the plaintiff over a specified period. The plaintiff had entered into a contract with a Russian railway company to deliver wagons. Under this contract, the plaintiff was to pay two roubles per wagon for each day's delay in delivering E the wagons to the railway company. In negotiations between the plaintiff and the defendant, the defendant was informed of the contract with the Russian railway company, but neither the day for delivery of the wagons nor the late payment charges was mentioned. The defendant caused a delay in the delivery of wheels to the plaintiff, as a result of which the plaintiff became F liable for the contracted late payment charges. The Russian company, however, agreed to receive one rouble per wagon per day, which amounted to £100. The court at first instance allowed the claim for damages, and directed the verdict to be entered at £100 13s. On appeal, it was held that the plaintiff would not have been entitled to claim the penalties charged by G the Russian railway company, and would only have been entitled to reasonable compensation for the loss of use of the wagons. Nonetheless, the court allowed the verdict to stand, on the basis that, had the jury been properly directed, they might have reasonably assessed damages at £100 13s, taking into account of the fact that the contract value was £3,200. The H relevant passages of the judgment are set out below:

As the plaintiffs did not actually lose more than a rouble a day, which they paid, that forms the extreme limit of the damage they can recover, for they are not entitled to make a profit out of the defendant's default. Had the amount of damages been actually left to the jury, the question would have been whether the defendant were liable for as much. If the judge I had told the jury expressly that the penalties as such could not be recovered, but that the plaintiffs were entitled to such damage as in their opinion would be fair compensation for the loss which would naturally arise from the delay, including therein the probable liability of the

> plaintiffs to damages by reason of the breach through the defendant's default of that contract to which, as both parties knew, the defendant's contract was subsidiary, the direction would not, at all events, have been too unfavourable to the defendant.
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> We think that, if so directed, a jury in all probability would, and certainly reasonably might, have assessed the damages at 100/. 13s., which, after all, is no heavy percentage, the contract price being 3200/.
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> We think we must construe the reservation as meaning that the verdict should stand if the jury properly directed might reasonably have found this sum.

[45] In my view, the facts of *Die Elbinger* is on all fours with the facts of the present case, with the only difference being that I have found that it would have been in the reasonable contemplation of the defendant here that the letter of award would have contained some form of late payment charges or liability for liquidated damages. The plaintiff clearly would not have been entitled to claim for the full amount of liquidated damages charged to it by TM, for it would not have been in the reasonable contemplation of the defendant that a delay would operate to wipe out the whole of the contracted purchase price for the generator sets.

[46] What are the damages that ought to be awarded, if the plaintiff is not entitled to the full amount of liquidated damages? In *Die Elbinger*, the plaintiff was held to be entitled to "to such damage as in [the jury's] opinion would be fair compensation for the loss which would naturally arise from the delay", including the liability of the plaintiff for damages under the contract with the Russian railway company.

[47] In our case, I am of the view that the plaintiff would be entitled to such damages as could reasonably be contemplated by the defendant to be the liquidated damages that the plaintiff would have to pay to TM under the letter of award. Taking into consideration that the whole contract value was RM2,968,000, and taking into further account of the amount of liquidated damages actually paid to TM, I assess the sum of damages payable as RM500,000.

[48] Learned counsel for the defendant referred to the court to the decision of the Federal Court in *Selva Kumar Murugiah v. Thiagarajah Retnasamy*[13]. In this case, it was held, *inter alia*, that the court may have resort to good sense and fair play to fix a reasonable amount of damages only where there are no established measure of damages employable in a particular case. Where, however, there is an established measure of damages and losses could have been assessed based on settled rules, the failure to bring evidence or to prove damages will result only in nominal damages being awarded. It was therefore argued, because there is an applicable measure of damages in order to ascertain the actual loss occasioned to TM as a result of the delay in the commissioning of its data centre, and because the plaintiff had failed to prove those, the plaintiff was only entitled to nominal damages.

[49] This argument is answered in two parts.

[50] The first is that the plaintiff here had in fact proved its losses, and such losses are in my view far in excess of what it would have been entitled to recover as damages, based on the principles of remoteness as applied in the preceding paragraphs. The plaintiff led evidence that it had in fact paid the sum of RM3,283,200 as liquidated damages to TM. This evidence was not refuted by the defendant.

[51] The second is that *Selva Kumar* must be understood in the light of the recent decision of the Federal Court in *Cubic Electronics Sdn Bhd (In Liquidation) v. MARS Telecommunications Sdn Bhd*[14]. *Selva Kumar* was concerned with the proper construction of s. 75 of the Contracts Act 1950 and the question of whether damages will still need to be proved in circumstances where there existed a term in a contract providing for liquidated damages upon breach of a primary obligation. At the time of the date fixed for submissions in this present case, the Federal Court had not yet delivered its seminal decision in *Cubic Electronics*. Although this case was concerned with the forfeiture of a deposit paid as earnest money to secure performance, the principles established are of general application to all cases under s. 75 of the Contracts Act 1950.

[52] The sum effect of *Cubic Electronics* is that liquidated damages clauses are *prima facie* enforceable without proof of actual loss. Where a party seeks to challenge its enforceability, that party must show that the liquidated damages clause in question was unreasonable in the circumstances of the case.

[53] In the context of the present case before me, it will be apparent that, applying *Cubic Electronics*, a court would give effect to the intent of the parties in connection with the liquidated damages clause under the letter of award. If the plaintiff here had sought to challenge the amount of liquidated damages provided, it would have been incumbent upon the plaintiff to prove that the sums were unreasonable. In determining whether the sums specified were unreasonable, the court will have regard to, *inter alia*, whether TM had a legitimate commercial interest to protect, and whether the sum specified as liquidated damages was proportionate having regard to the terms of the contract as a whole.

[54] There is, therefore, every likelihood that the liquidated damages clause in the letter of award would be upheld, had its reasonableness been challenged in a court of law. It was therefore quite proper in the circumstances for the plaintiff to have paid TM, after some negotiations, the amount of RM3,283,200 to settle the plaintiff's breach of its delivery obligations under the letter of award. The plaintiff could not, however, claim this amount from the defendant, as it had not told the defendant at any time prior to the entering into the contract, that it was liable to TM for liquidated

damages for late delivery. Nonetheless, I take the view that, because the defendant knew of the existence of a contract between the plaintiff and TM and because it was within the contemplation of a reasonable person in the position of the defendant that liquidated damages would have been likely to have been provided for in a contract of the nature entered into between them, the defendant would be liable for a reasonable sum as damages.

The Rebate Claim

[55] Due to the failure of EPG1, it became necessary for repairs to be effected to it. TM's consultant engineer for the data centre renovation project, MCE Consulting Sdn Bhd, advised TM that a new engine should be provided, rather than simply overhauling EPG1.

[56] In the end, the plaintiff agreed with TM for a 30% rebate on the contracted price for EPG1, which rebate amounted to RM318,741.20.

[57] The plaintiff sought to claim this amount from the defendant.

[58] The short answer to this claim is simply that the contract did not provide for any obligation on the part of the defendant to replace any of the generator sets in the event that any of them failed the testing and commissioning procedures. It was not in dispute that EPG1 had been repaired by the defendant. There was no suggestion that what had initially been delivered by the defendant to TM's premises was anything other than a new generator set. Just because EPG1 had failed during integrated systems testing and consequently had to undergo an overhaul and have its parts replaced does not make it a second-hand generator.

[59] I am therefore in agreement with the submissions of the counsel for the defendant, that the payment of the rebate by the plaintiff to TM was misconceived. But even if there existed an obligation on the part of the plaintiff to TM to not only repair the generator set but also to provide a discount on account that the generator set was "no longer new" (and this may well be the case, as the letter of award contemplated that formal contracts would be entered into, but these formal contracts were never adduced at trial), there was no corresponding obligation owed by the defendant to the plaintiff under the contract.

The Claim For Other Costs

[60] In items 3 to 21 of Appendix 3 of the statement of claim, the plaintiff sought to make the defendant liable for, among others, the costs that it incurred in rectifying the generator sets in order that they passed integrated systems testing.

[61] Having examined carefully the witness statement of PW1 (who is a director of the plaintiff), I am unable to see where it is that the evidence relating to these additional costs were led. In answer to question 49, the

witness merely refers to Appendix 3 of the statement of claim, where the items of special damages have been particularised. Nowhere in the witness statement does PW1 refer to any documentary evidence such as invoices, receipts or other proof of payment for these additional costs incurred by the plaintiff.

[62] It may well be that, lurking in the voluminous bundles that have been prepared for the purposes of trial are these documents. However, if neither of the witnesses of the plaintiff has made reference to the documents, it would be quite improper for the court to make conjectures as to which of these documents pertain to an item of cost claimed, even if those documents had been categorised as part B documents (the authenticity of which are not disputed).

[63] Had the evidence regarding these costs been properly led, I have no doubt that I would have found for the plaintiff in respect of these items. These were costs that arose as a natural consequence of the defendant's breach, and would therefore come within the first limb of s. 74(1) of the Contracts Act 1950. In the circumstances, I dismiss the plaintiff's claim for these items of costs.

Mitigation

[64] It was advanced for the defendant that the plaintiff had failed to mitigate its loss by not placing a temporary generator set in place of EPG1 in order to meet the contractual deadline and to reduce its liability to TM for liquidated damages. At the material time, the consultant engineer to TM for the project, MCE Consulting Sdn Bhd, had advised TM that this was a potential solution.

[65] At trial however, Ir Fang Pek Hang (PW2), the managing director of MCE Consulting Sdn Bhd, testified that:

> … a temporary generator set would complicate matters as it involves dismantling of permanent work which was already tested.[15]

[66] In my view, due weight ought to be accorded to the testimony of Ir Fang at trial, as he was an independent party to the dispute. There was no reason for him to now state that a temporary generator was problematic (contrary to the earlier advice), other than the fact that this was his honest assessment of the situation. I therefore find that the contention the plaintiff had failed to mitigate its loss has not been made out.

The Counterclaim

[67] The defendant counterclaimed against the plaintiff for the sum of RM188,968.31. This sum comprises:

(i) RM167,768.31, which was invoiced on 5 April 2016. The items in this invoice related to items in the purchase order of 6 July 2015; and

(ii) RM21,200, which was claimed for the supply of temporary load banks, which the defendant contended was payable pursuant to item 7 of the purchase order of 6 July 2015.

[68] In cross-examination, PW1 accepted that the items invoiced on 5 April 2016 would have been payable, but for the contended default of the defendant. For this reason, I allow the counterclaim for the amount of RM167,768.31, and direct that it be set off against the amount of damages due from the defendant to the plaintiff.

[69] By contrast, the claim for RM21,200 was not supported by any invoice issued by the defendant. For this reason, I was not satisfied on the evidence that the amount claimed for the supply of temporary load banks was in fact due and payable by the plaintiff. For this reason, I dismissed this part of the counterclaim.

Orders

[70] For the reasons explained above, there is judgment as follows:

(a) the defendant is to pay to the plaintiff the amount of RM500,000 as special damages;

(b) the plaintiff is to pay the defendant the amount of RM167,768.31 as special damages, which amount to be set off from the damages payable pursuant to para. (a) above;

(c) the defendant is liable to compensate the plaintiff at a rate of 5% per annum on RM332,231.69 (being the difference between the sums referred to in paras. (a) and (b) above), from 30 October 2015 until today;

(d) the defendant is liable to post-judgment interest at a rate of 5% per annum on the sum of (i) RM332,231.69 and (ii) the pre-judgment interest pursuant to para. (c), from tomorrow until full satisfaction of this judgment; and

(e) the defendant is to pay costs of RM75,000.

[71] All other claims are disallowed.

Endnotes:

1. [1993] 1 SLR 73, per Warren LH Khoo J
2. (1854) 9 Exch 341
3. [1972] 1 LNS 153; [1972] 1 MLJ 171, [1972] 1 MLRA 26
4. [1994] 4 CLJ 783, [1994] 3 AMR 2407, [1994] 2 MLJ 569, [1994] 1 MLRA 394
5. [1949] 2 KB 528

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6. *Czarnikow v. Koufos* [1969] 1 AC 350
7. *Transfield Shipping Inc v. Mercator Shipping Inc* [2009] 1 AC 61
8. See B1/61 of the Trial Bundles
9. See B4/1

B

10. [1949] AC 196 at 224
11. Thirtieth Edition
12. (1874) LR 9 QB 473

C

13. [1995] 2 CLJ 374, [1995] 2 AMR 1097, [1995] 1 MLJ 817, [1995] 1 MLRA 188
14. [2019] 2 CLJ 723, [2019] 1 AMR 737
15. Q&A 17, WSP2

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